IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.11573 of 2006

For Approval and Signature:
HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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JIVANBHAI BAVJIBHAI HARIJAN - Petitioner(s)
Versus
KHUSALBHAI BAVJIBHAI HARIJAN & 1 - Respondent(s)

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Appearance :
MR ZUBIN F BHARDA for Petitioner(s) : 1,
MR NV GANDHI for Respondent(s) : 1 - 2.

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

Date : 04/10/2006
ORAL JUDGMENT

1. This petition, under Article 227 of the Constitution, challenges order dated 8th May, 2006 made by the Court of 3rd Additional District Judge, Vyara, Dist. Surat in Misc. Civil Appeal No.5 of 2005 whereby order dated 20th February, 2005 made by the Court of Joint Civil Judge (J.D.), Bardoli, below application Exh.5 came to be

reversed.

2. The petitioner herein is the original plaintiff while the respondents are the original defendants of Regular Civil Suit No.29 of 2004. Hereinafter, for the sake of convenience, the parties shall be referred to as per their respective description in the suit.

3. Heard Mr. Zubin F. Bharda, learned advocate for the plaintiff, and Mr. N.V. Gandhi, learned advocate for the defendants. RULE. Mr.Gandhi, learned advocate, waives service of rule. Considering the dispute between the parties, which lies in a very narrow compass, the petition is taken up for final hearing and disposal today.

4. Admittedly, the dispute between the parties pertains to land situated at Village Kani, Taluka Mahuva, Dist. Surat. The plaintiff and both the defendants are real brothers, being children of one Ukiben alias Kashiben. It is an accepted position between the parties that late father of Ukiben, one Shri Mithabhai Bavjibhai, was owner of lands situated at Village Kani as well as at Village Amroli. The say of the plaintiff is that as per Will

dated 17th June, 1940 the plaintiff became owner of the lands in dispute viz. situated at Village Kani. That the said lands were originally belonging to Gayakvad State and were, therefore, given as Vatanvadi lands to late Mithabhai, who was serving in Gayakvad State. It is further the say of the plaintiff that in so far as lands situated at Village Kani are concerned, though he was bequeathed the lands by Will of late Mithabhai, the bequest was subject to conditions imposed by the Gayakvad State viz. the holder of such Vatanvadi lands had to be in service of Gayakvad State. That as the plaintiff fulfilled such conditions, his name was mutated by passing of appropriate entries in the revenue records and since then he has been in exclusive possession and ownership of the said lands.

5. As against that the case of the defendants is that there was a Deed of Partition executed on 5th June, 1972 between the parties by way of a mutual agreement and all the lands, including lands at Village Kani and Village Amroli came to be partitioned between the parties. That by virtue of the said Partition Deed the defendants were put in possession of the disputed lands at Village Kani.

6. The trial Court did not accept the case made out by the defendants and granted interim injunction in favour of the plaintiff by partly allowing application Exh.5. It was directed by the trial Court that the defendants shall not disturb the possession of the plaintiff till final disposal of the suit. That in so far as the lands at Village Amroli are concerned, the parties were directed to maintain status-quo till disposal of the suit. Being aggrieved, the defendants preferred appeal which came to be allowed by impugned order dated 8th May, 2006. The appellate Court has set aside the entire order dated 20th January, 2005 and dismissed the injunction application Exh.5 in entirety. The plaintiff had challenged the aforesaid order made by the appellate Court.

7. As the facts reveal, and even Mr. Gandhi, learned advocate appearing on behalf of the defendants, has submitted that in so far as direction of the trial Court qua lands at Village Amroli are concerned, the defendants do not have any grievance though the appeal was both in relation to the direction qua lands at Village Kani and Village Amroli. Despite this fact situation, the appellate Court has set aside the entire order made by

the trial Court without even realizing or appreciating that a part of the order was not seriously challenged.

8. However, what is more material is the following recording of facts by the appellate Court in Paragraph No.14 of the impugned judgment and order:

> "14. The plaintiff has produced other documentary evidence vide D. List Exh.3. Referring to Mark 3/21 to 3/23, VF No.6, it appears that as per the will, the lands situated at village Kani which were in the name of Mithabhai Bavjibhai had entered in the name of plaintiff Jivanbhai Bavjibhai by entry No.733. Dt:1-2-59. It further appears that the lands were entered in the name of plaintiff Jivanbhai Bavjibhai as Gam Nokar (Vatanvadi) with a condition that after the payment of necessary amount of possession right, the land will be re-granted to Jivanbhai Bavjibhai. It further appears that thereafter, Jivanbhai Bavjibhai had paid the necessary amount and therefore, it was re-granted to him on dt: 20-8-60 as a new tenure land. It further appears that the plaintiff Jivanbhai Bavjibhai had obtained necessary order for converting the land from the new tenure land to old tenure land and necessary entry no.4904, dt: 26.10.02 was also entered in the revenue record pertaining to this aspect."

9. When one goes through the impugned judgment and order in entirety it is apparent that after recording the aforesaid facts the appellate Court has not only not appreciated the significance of the said facts but has failed to assign any reason as to why the said facts are not acceptable in so far as the case put up by the plaintiff is concerned. The appellate Court has lost sight of the fact that the Will dated 17th June, 1940 executed by late Mithabhai Bavjibhai has been given effect to and in the circumstances there is no question of only relying only upon the Deed of Partition executed in 1972. What is more important is that the defendants had at no point of time staked any claim on the basis of Partition Deed by preferring a suit but had raised the same as a defence and relied upon the Partition Deed of 1972 in the suit filed by the plaintiff. In the circumstances, once the defendants had at least prima facie accepted the existence of Will executed in 1940 by late Mithabhai, maternal grand-father of both the sides, there was no occasion for the appellate Court to come to the conclusion in light of the facts found on record that the order made by the trial Court suffered from vice of perversity. The appellate Court failed to appreciate that

the plaintiff had prima facie proved his case once facts recorded in Paragraph No.14 of the appellate order were found to be correct. In absence of such a fact situation, namely, perversity, the appellate Court could not have interfered with the order made by the trial Court and has thus committed a jurisdictional error in reversing the order made by the trial Court.

10. In the circumstances, the impugned order dated 8th May, 2006 made by the appellate Court is hereby quashed and set aside and the order made by the trial Court dated 20th January, 2005 in application Exh.5 is restored to file. The order made by the trial Court to operate till final disposal of the suit.

11. The petition is allowed accordingly. Rule made absolute. There shall be no order as to costs.

Sd/-
[D.A. MEHTA, J]

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Bhavesh*